Labor Board Rules in Jeopardy in the Post-Chevron Era: What Employers Need to Know

Insights
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The Supreme Court's recent landmark ruling that gives employers a powerful tool to fight back against regulatory overreach will have a broad impact on just about every area of workplace law. We're looking at the specific federal agency rules and positions most susceptible to attack now that SCOTUS ditched the decades-old *Chevron* doctrine. This edition will focus on how the new standard could be used to combat the National Labor Relations Board's grip on labor relations doctrine.

How SCOTUS Stripped Power From Federal Agencies

For 40 years, courts routinely deferred to an agency's "reasonable" interpretation of ambiguous regulatory provisions, but SCOTUS just tossed out that so-called *Chevron* deference. Now, courts are empowered with independent judgment to decide if an agency has stepped out of bounds. Read more about this game-changing decision and how it could impact your workplace.

On top of that, the Court ruled on July 1 that the six-year statute of limitations to contest regulatory actions under the Administrative Procedures Act doesn't start ticking until someone is actually injured by the regulation, which could significantly stretch the timeframe for employers to file suit against rules they believe are too broad. Previously, the six-year statute of limitations began running upon the law going into effect. Here's how this ruling further opens the door for employers to challenge federal regulations.

A Glance at the NLRB's Outsized Power

The National Labor Relations Board (NLRB) has reshaped labor law in recent years. Several factors have allowed the agency to act as a quasi-legislative body:

- The National Labor Relations Act (NLRA) is **subject to extensive interpretation**, particularly given how significantly the workplace has changed since it was enacted in 1935.
- Historically, the NLRB has **relied on *Chevron* deference** among a host of agency-specific deferential standards (regardless of who occupies the White House) in issuing regulations and defending its interpretations of the law.
- Like many executive branch agencies, the NLRB has become **increasingly politicized**, leading to substantial "pendulum swings" in the Board's ideology from one administration to the next.

The agency tends to wield its authority in two primary ways: rulemaking and decision making. The NLRB has aggressively exercised both functions (particularly the latter) against the backdrop of President Biden's initial campaign pledge to be "the most pro-union president in American history" – making *Chevron* deference more important to the agency than ever before.

New Weak Spots for the NLRB

The end of *Chevron* is bound to have a profound impact on the Board's doctrine. Now that courts are less obligated to yield to agency interpretations of their own regulations, the NLRB is poised to lose its recently unchecked power as its positions become subject to increased and meaningful judicial scrutiny.

Several controversial rules could be struck down as a result, ranging from the agency's final joint employer rule (which has been temporarily halted pending judicial review) to the so-called "quickie" election rule and other regulatory modifications that were never put through the conventional notice and rulemaking process. Perhaps most importantly, a narrowed deference standard could pave the way for a lower threshold to challenge:

- **the Board's ever-expanding interpretation of "protected concerted activity"** under Section 7 of the NLRA (for example, this decision reinstating the broader "totality of evidence standard" in assessing whether individual conduct was protected);
- **decisions impacting unionized employers** (for example, these decisions reviving limits on employer actions during first contact negotiations and after a contract expires); and
- **decisions impacting non-union employers** (for example, this decision creating a new framework that will determine when employers are required to bargain with unions without a representation election, or this decision extending the Board's remedial arsenal in all agency proceedings to include consequential damages)

Note, though, that while SCOTUS said good riddance to *Chevron* deference, its 1944 decision in *Skidmore v. Swift* seemingly remains unscathed. The *Skidmore* doctrine (along with a number of NLRB-specific deference decisions that followed it) extends some deference to agencies in situations where the agency can persuasively explain why its position in question should hold sway, but it is a much narrower test than *Chevron*.

What's Next?

We expect to see a flurry of cases attacking the NLRB's interpretations of the NLRA, and many of the Board's rules and administrative guidance may not survive judicial review. We can also expect different rulings on similar issues in different jurisdictions – likely resulting in even more forum shopping for parties aggrieved by the Board's final decisions and orders (as well as a patchwork of compliance obligations and more headaches for multistate employers). For example, the first federal appeals court to review an NLRB order after *Chevron* was overturned indicated that a "very

high degree of deference" to the agency was warranted under the circumstances – but nothing is stopping the court (or others) from adopting a different view going forward. Over time, though, the net result will likely be diminished power for the NLRB.

What Should You Do?

- You should work with counsel to determine whether you can or should change any of your practices or policies given the expected shifts to come and to assess whether you should reexamine any ongoing litigation or agency investigations in light of the new standard.
- You should also team up with industry and trade associations to identify agency positions that affect your business and work together to challenge agency action that has crossed the line.

Conclusion

We will continue to monitor developments in the expected new wave of challenges to the NLRB's rules and positions, so make sure you subscribe to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Labor Relations Practice Group.

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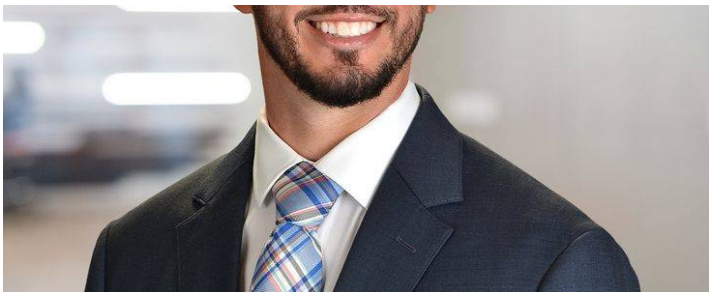

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